

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DEBORAH BUDKE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,644
<b>STATE OF KANSAS</b>	)	
Respondent	)	
AND	)	
	)	
<b>STATE SELF-INSURANCE FUND</b>	)	
Insurance Fund	)	

**ORDER**

Respondent and its insurance fund appealed the September 21, 2011, Order entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on November 2, 2011. The Director appointed Joseph Seiwert of Wichita, Kansas, to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample. As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary R. Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Seiwert will continue to serve as a Board Member Pro Tem in this case.

**APPEARANCES**

Michael C. Helbert of Emporia, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

**RECORD AND STIPULATIONS**

The record consists of the June 18, 2010, post-award hearing transcript; the September 16, 2011, motion hearing transcript and exhibit thereto, together with the pleadings contained in the administrative file.<sup>1</sup>

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<sup>1</sup> The administrative file includes an Agreed Award entered into by the parties on September 7, 2001.

### ISSUES

An Agreed Award was entered in this claim on September 7, 2001. The Agreed Award states that it is to be treated as if all issues have been fully tried, but left open all future rights upon proper application to the Director, including the right to future medical compensation. Subsequent to the Agreed Award, claimant filed several applications for post award medical. A motion hearing was held on September 16, 2011. In his September 21, 2011, Order, ALJ Avery ordered respondent to pay claimant's attorney fees and expenses per Claimant's Exhibit 1.

In its Notice of Appeal to the Board, respondent states its position as follows:

The respondent alleges that the judge exceeded his or her *[sic]* jurisdiction in awarding post-award attorney fees, in that pursuant to the controlling authority of *Siler vs. Shawnee Mission School District* USD 512, 45 Kan. App. 2d 586, 590 a workers compensation final settlement award that leaves open the issue of future medical treatment is not a final settlement of that issue. In the case at bar the claimant sought attorney fees for time expended in securing medical treatment, where there had been, like in *Siler*, an agreed award (dated September 7, 2001) which left open the issue of future medical treatment. As the pursuit of additional medical was by definition not a post-award matter then the awarding of post-award attorney fees was improper.<sup>2</sup>

Claimant contends respondent's reliance on *Siler* is ill advised and not supported by the clear language of the case. She submits that respondent is confusing the phrase "final settlement" with "final award." Claimant argues this appeal is frivolous and requests the Board affirm the ALJ's Order and, further, grant claimant reasonable attorney fees for the response to this appeal.

The issues before the Board on this appeal are:

1. Is the Agreed Award entered into by the parties a final award? Respondent contends that a workers compensation final settlement which leaves open the issue of future medical treatment is not a final award on that issue. Respondent asserts that if the Board determines the Agreed Award is not final with respect to the issue of medical treatment, then claimant would not be entitled to attorney fees.

2. If the September 21, 2011, Order of the ALJ is affirmed, is claimant entitled to additional attorney fees for responding to respondent's appeal?

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<sup>2</sup> Respondent's Notice of Appeal at 1 (filed Sept. 28, 2011).

### FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

On September 7, 2001, the parties entered into an Agreed Award. The parties agreed that claimant had a 10% permanent partial impairment to the body as a whole, which equated to \$8,556.48. The Agreed Award, in part, states:

15. That all future rights remain available upon proper application to the Director, including the right to review and modification and the right to future medical compensation and that Dr. Amundson is designated as the agreed upon authorized treating physician.<sup>3</sup>

Another section of the Agreed Award states:

This Agreed Award is to be treated as if all issues in this case have been fully tried. All future rights shall remain available, subject to application to the Director, as though this case had been fully tried and the court found that claimant suffered a 10% permanent partial impairment to the body as a whole.<sup>4</sup>

Claimant filed applications for post award medical on November 20, 2008; October 29, 2009; March 2, 2010; April 13, 2010; and February 16, 2011. On February 24, 2010, claimant filed a Motion for Change of Treating Physician. That motion was heard on June 18, 2010, at which time the parties announced they reached an agreement. It appears respondent agreed to provide the names of three physicians and claimant would choose one to be her treating physician. At that post-award hearing the ALJ stated: "We are here for post award."<sup>5</sup>

On August 16, 2011, claimant's attorney filed an affidavit with attached itemized attorney fees and expenses from June 23, 2010, through December 23, 2010, and interest. Claimant requested payment of \$105.00 in attorney fees, \$66.74 in expenses, and \$68.47 in interest, for a total of \$240.21. Although claimant's attorney's affidavit states that \$200.00 per hour is reasonable for an attorney with his experience, the hourly rate on the bill for legal services is \$175.00 per hour. On August 24, 2011, claimant's attorney filed a Notice of Hearing on the issue of attorney fees.

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<sup>3</sup> Agreed Award (Sept. 7, 2001) at 2 (emphasis in original).

<sup>4</sup> *Id.*, at 3 (emphasis in original).

<sup>5</sup> P.A.H. Trans. at 3.

A motion hearing was held on September 16, 2011. Respondent's counsel objected to the hourly rate for fees of claimant's counsel and objected to respondent being charged for 323 photocopies. Respondent's counsel asserted that because the Agreed Award left future medical open, it is not a final settlement on that issue. Therefore, respondent's counsel contended this is not a post-award matter, and attorney fees are not permitted.

The ALJ issued an Order on September 21, 2011, ordering respondent to pay claimant's attorney fees and expenses per Claimant's Exhibit 1.<sup>6</sup> In that Order, the ALJ stated: "the claimant's Application for Preliminary Hearing comes on for hearing before the Administrative Law Judge for the Division of Workers Compensation of the State of Kansas."<sup>7</sup> In its Notice of Appeal, respondent asserted the ALJ exceeded his jurisdiction by awarding attorney fees because the final settlement award (Agreed Award) left future medical treatment open and, therefore, was not a final settlement of that issue.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In support of its position, respondent cites *Siler*.<sup>8</sup> Siler entered into a settlement award with U.S.D. 512, wherein she received a lump sum, but future medical treatment was left open. U.S.D. 512 filed an application for preliminary hearing requesting Siler's psychotherapy be discontinued. Siler objected to respondent's request and further argued that the preliminary hearing procedure was inappropriate. The ALJ proceeded with the preliminary hearing and issued an order terminating Siler's psychotherapy. A Board Member dismissed Siler's appeal from that preliminary order for lack of jurisdiction. The Kansas Court of Appeals concluded that where a final settlement leaves the issue of future medical treatment open, the ALJ has jurisdiction under K.S.A. 44-534a to issue a preliminary order. The Court, in *Siler*, stated: "A workers compensation final settlement award that leaves open the issue of future medical treatment is not a final settlement on that issue."<sup>9</sup>

In workers compensation an injured worker generally has the right to seek additional medical treatment after the entry of the final award. This is commonly referred to as "future medical." The language of the September 7, 2001, Agreed Award clearly indicates that it is to be treated as if all issues had been fully tried. The parties intended that if a future

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<sup>6</sup> Claimant's Exhibit 1 to the September 16, 2011, motion hearing transcript is claimant's attorney's affidavit with itemized attorney fees and expenses from June 23, 2010, through December 23, 2010, and interest.

<sup>7</sup> ALJ Order (Sept. 21, 2011).

<sup>8</sup> *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92, *pet. for rev. filed Apr. 29, 2011* (2011).

<sup>9</sup> *Id.*, at 590.

issue needed to be addressed, that issue would be treated as though fully tried before an ALJ. Therefore, the Board finds that the Agreed Award constituted a final award on all issues.

K.S.A. 2010 Supp. 44-510k(c) allows an ALJ to assess attorney fees and costs on claimant's behalf consistent with K.S.A. 44-536(g). K.S.A. 44-536(g), in part, states:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services . . . .

Claimant's attorney rendered services to claimant in a post-award hearing for additional medical benefits. Respondent did not appeal the amount of attorney fees and costs billed by claimant's attorney, but instead claims no attorney fees should be awarded. Consequently, the Board finds that claimant's attorney is entitled to reasonable attorney fees and costs and the attorney fees and costs approved by the ALJ are reasonable.

Claimant's counsel requested in his brief and at oral argument before the Board that the Board assess additional attorney fees against respondent. K.S.A. 44-536(h) provides that all disputes regarding attorney fees shall be heard and determined by the ALJ. Accordingly, claimant should submit her request for additional attorney fees to the ALJ.

### **CONCLUSIONS**

The Agreed Award entered into by the parties clearly states the Agreed Award is to be treated as though all issues were fully tried. K.S.A. 2010 Supp. 44-510k(c) and K.S.A. 44-536(g) allow the ALJ to assess attorney fees and costs against respondent. Respondent did not appeal the issue of whether the attorney fees and costs were reasonable. Therefore, the Board affirms the Order of the ALJ.

Claimant should submit her request for additional attorney fees to the ALJ.

**WHEREFORE**, the Board affirms the September 21, 2011, Order entered by ALJ Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund  
Brad E. Avery, Administrative Law Judge